In such a case the vendor can accept the repudiation and claim the forfeit of the deposit.

The matter is clearly stated by Cotton L.J. in the leading case of *Howe* v. *Smith* [2] as follows:—

"The deposit, as I understand it, and using the words of Lord James (viz. in *Ex parte Barrell* L.R. 10 Ch. 512), is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit".

Cotton L.J. went on to say that he was not saying that in all cases where the courts would refuse specific performance the vendor ought to be entitled to retain the deposit. He made plain that, in order to enable the vendor so to act, in his opinion there must be acts on the part of the purchaser which would make his conduct amount to a repudiation on his part of the contract.

The appellant has sought to argue that there has been no express repudiation on his part or conduct which amounts to repudiation in the sense in which the word is used by Cotton L.J.

Their Lordships cannot accept his contention. The appellant has throughout insisted that he was not prepared to go on with the contract unless he obtained an alteration which would make a substantial variation in the obligations imposed upon him.

The correspondence between the solicitors to which reference has been made makes this clear. The appellant when he failed to get his way made no effort to fulfil the contract in its original form. He was acting as an agent and the evidence of his principal, a Mr. Segram Jeyaraja, was that he had every intention of carrying on with the contract if he was given the extension of time and paragraph 4 of the supplemental agreement. He also said that clause 4 was not accepted by the vendors and that was the reason why he did not continue with it. The appellant was saying he could not go on unless he obtained additional finance in the way suggested by him. This may be called a conditional repudiation but the vendor was entitled to take the purchaser at his word and treat the contract as at an end. It was made plain at the interview of the 8th August that finance was the stumbling block. The proposed sub sales were discussed and heads of agreement to get more time were settled. The belated injection of clause 4 into the letter of the 17th August when its subject had not been included in the letter of the 10th August makes it incredible that clause 4 had been agreed in principle at the interview of the 8th August. The course of conduct between the parties shown by the correspondence and by the oral evidence leads to the inference that the appellant had, in the sense in which the word is used in the authorities, repudiated the contract. It cannot therefore be said that it is unconscionable for the respondents to insist on their legal rights to make the appellant forfeit the deposit which remains in their hands.

Their Lordships will accordingly report to the Head of Malaysia their opinion that the appeal should be dismissed and the costs of the respondents of this appeal paid by the appellant.

Appeal dismissed.

Solicitors: *Graham Page & Co.*; *Coward Chance & Co.*

YUNUS v. ANNUAR & ANOR.

[F.C. (Barakbah Ag. L.P., Ismail Khan and Azmi JJ.) October 5, 1964]

[Kota Bharu — Federal Court Civil Appeal No. 30 of 1963]

Negligence — Liability of owner of vehicle — Passenger taken on lorry contrary to orders of owner — Passenger driving vehicle in spite of protest by driver — Whether trespasser.

This was an appeal by the appellant the owner of a vehicle against a judgment which awarded damages against him in favour of the first respondent. The respondent had been injured as a result of a collision between a lorry driven by his driver and a lorry belonging to the appellant, which was at the time of the accident driven by the second respondent. The regular driver of the appellant's lorry had agreed to give the second respondent a lift and the second respondent had then driven the lorry in spite of the repeated protests of the regular driver. It was found that the accident was caused by the negligence of the second respondent in driving the lorry.

Held: as the driver had taken the second respondent as a passenger in disobedience of the employer's orders, the second respondent was a trespasser and not a servant of the appellant and the appellant was not liable for acts done by him.

[**Editorial Note:** See also *Chuan Seng & Co. Pineapples Factory* v. *Idris & Anor.* [1962] M.L.J. 239 where the Court of Appeal held that the owner of a vehicle was not liable in damages to the estate of a trespassing passenger.]

Cases referred to:—

(1) *Wright* v. *International Tea Co.* (unreported).

(2) *Twine* v. *Bean's Express Ltd.* [1946] 1 All E.R. 202.

(3) *Conway* v. *George Wimpey & Co. Ltd.* [1951] 1 All E.R 363.

FEDERAL COURT.

N. Sharma for the appellant.

Abdul Aziz for the 1st respondent.

Barakbah Ag. L.P.: This appeal by the appellant (2nd defendant) against the judgment of Hashim J. in awarding damages to the respondent (plaintiff) in the sum of $1,460 for loss

of earning for 73 days at $20 per day and costs, was heard on the 22nd of June 1964 and was allowed with costs. It was then intimated that a written judgment would be given later and I now do so.

The accident happened near Bunut Bridge, Kampong Pek at the 33¼ mile Kuala Krai Road. Both lorries were proceeding towards Kuala Krai from Kota Bharu. The plaintiff's lorry was driven by his driver, P.W.4, and P.W.6 was the driver of the 2nd defendant's lorry. The plaintiff's lorry was loaded with goods and the plaintiff was seated beside its driver P.W.4. The 2nd defendant was not present when the accident took place.

According to P.W.6, when he arrived at Melor he stopped for coffee and invited 1st defendant to have coffee with him. He was giving 1st defendant a lift to Kuala Krai. 1st defendant said he would like to drive the lorry as he was also a lorry driver. He drove it towards Kuala Krai in spite of the repeated protests of P.W.6, the regular driver of the 2nd defendant's lorry.

P.W.4 in his evidence stated that as he was approaching a bridge and a bend beyond the bridge he saw the 2nd defendant's lorry from his rear view mirror. He gave the signal to slow down because of the bridge and the bend. 1st defendant who was driving the lorry ignored the signal and tried to overtake the plaintiff's lorry. While he was trying to do so he knocked against the bridge railing and got into the stream. 1st defendant stated that P.W.4 gave him the signal to overtake the plaintiff's lorry and when he was overtaking it the latter swerved to the right resulting in the collision.

In his submission, Mr. Sharma, for the appellant stated that the court had to consider three issues:

(1) whether the 1st defendant was a servant of the appellant or not,

(2) whether there was negligence on the part of the appellant and

(3) whether special damages which should be strictly proved had been proved.

With regard to the first issue, Mr. Sharma submitted that the 1st defendant was a trespasser and that the appellant, the owner of the lorry, was not liable for acts done by him. In his evidence P.W.6, when cross-examined by appellant's counsel, said "I also knew that my lorry cannot carry passengers. 2nd defendant had warned me not to carry passengers. I disobeyed my employer's instructions on that day." With respect I agree with the views expressed by the learned counsel. In *Bingham's* Motor Claims Cases, 4th Ed. at page 87* it was stated that the driver of a trade vehicle which had no provision for passengers in the ordinary sense gave a lift to a pedestrian, who sat on a sort of continuation of the driver's seat. The driver had been warned on two occasions by his employers that he must not take up passengers, and on one occasion that it would cause some difficulty about the insurance policy. Croom-Johnson J. held:

"The driver's act was in defiance and disobedience of a precise prohibition. The scope of the authority must be measured by reference to the ordinary duties of such a man. He had no authority from his employers nor had he been held out by anybody as having authority to pick up passengers, and no such authority was to be implied. The plaintiff ought to have known she had no authority to get into the van and must take the consequences of her own neglect. The case was one of a prohibition which limited the sphere of employment and not a prohibition of conduct within the sphere of employment." *Wright* v. *International Tea Co.*, (unreported).

Also see the cases of *Twine* v. *Bean's Express, Ltd.*(2) and *Conway* v. *George Wimpey & Co. Ltd.*(3)

In the circumstances, it would appear that the appellant should succeed on this issue alone and consequently it would become unnecessary for me to deal with the other two issues. I would therefore allow the appeal with costs.

Ismail Khan and Azmi JJ. concurred.

Appeal allowed.

Solicitors: *N. Sharma*; *Wan Mustapha & Co.*

* p. 85, 5th Edn. (1964).

P.N. PILLAY & CO. LTD. v. KAH MOTOR CO. LTD.

[O.C.J. (Abdul Aziz J.) October 5, 1964]

[K.L. — Civil Suit No. 735 of 1963]

Hire Purchase — Failure to pay instalment on motor car — Seizure of motor car — Necessity to terminate hiring.

Damages — Hire purchase of car — Unlawful seizure.

This was an action for damages for illegal seizure of a motor car the subject of a hire purchase agreement. The agreement provided that in default in the punctual payment of any of the hire rentals "the owners may immediately terminate the hiring and they shall thereupon without notice or demand....become entitled to the immediate possession of the vehicle and to retake and resume possession of the same". In this case it appeared that the plaintiff had not paid the first instalment and the respondent had seized the car, but they did not give any notice of termination of the hiring.

Held: under the terms of the agreement the owner cannot repossess the motor car until he has terminated the hiring and as there was no evidence that the defendant had terminated the hiring in this case before seizure, the seizure was unlawful.

Cases referred to:—

(1) *Abingdon Finance Co. Ltd.* v. *Champion* [1961] *Guardian*, November 6, 1961.